



DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

7 CFR Part 272

[FNS-2022-0005]

RIN 0584-AE86

Supplemental Nutrition Assistance Program: Revision of Civil Rights Data

Collection Methods

AGENCY: Food and Nutrition Service (FNS), Agriculture (USDA).

ACTION: Proposed rule.

SUMMARY: The Food and Nutrition Service (FNS) proposes to revise Supplemental Nutrition Assistance Program (SNAP) regulations that cover the collection and reporting of race and ethnicity data by State agencies on persons receiving benefits from SNAP.

This rule would remove regulatory language that provides an example that State agencies might collect race and ethnicity data by observation (also referred to as “visual observation”) when participants do not voluntarily provide the information on the application form. Through this rulemaking, FNS intends to improve the quality of data collected for purposes of Federal civil rights law and policy (including Title VI of the Civil Rights Act of 1964). USDA's Food and Nutrition Service is committed to promoting equity and inclusion through its Federal nutrition assistance programs. This regulatory change is consistent with this Administration’s priorities and furthers FNS’ commitment to build equitable and inclusive systems for nutrition access.

DATES: Written comments must be received on or before [insert date 60 days after date of publication in the Federal Register] to be assured of consideration.

ADDRESSES: The Food and Nutrition Service, USDA, invites interested persons to submit written comments on this proposed rule. Comments may be submitted in writing by one of the following methods:

- Federal eRulemaking Portal: Go to <https://www.regulations.gov>. Follow the online instructions for submitting comments.

- Mail: Send written comments to State Administration Branch, Program Accountability and Administration Division, Supplemental Nutrition Assistance Program, Food and Nutrition Service, USDA, 1320 Braddock Place, 5th floor, Alexandria, VA, 22314.

- All written comments submitted in response to this proposed rule will be included in the record and will be made available to the public. Please be advised that the substance of the comments and the identity of the individuals or entities submitting the comments will be subject to public disclosure. FNS will make the written comments publicly available via <https://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: Maribelle Balbes, Chief, State Administration Branch, Program Accountability and Administration Division, Supplemental Nutrition Assistance Program, Food and Nutrition Service, USDA, 1320 Braddock Place, 5th floor, Alexandria, VA, 22314, by phone at (703) 605-4272 or via email at: SM.FN.SNAPSAB@usda.gov.

SUPPLEMENTARY INFORMATION:

I. Background

Current Policy

Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, or national origin in programs receiving Federal financial assistance. Additionally, Department of Justice (DOJ) regulations¹ at title 28 of the Code of Federal Regulations

¹ <https://www.ecfr.gov/current/title-28/chapter-I/part-42/subpart-F/section-42.406>

(CFR), § 42.406(a) require all Federal agencies to provide for the collection of racial and ethnic information from applicants and beneficiaries of Federal assistance programs sufficient to permit effective enforcement of Title VI. Accordingly, SNAP regulations at 7 CFR 272.6(g) and (h) require State agencies to collect race and ethnicity data on participating households and report the data to FNS to help ensure program benefits are distributed without regard to race, color, or national origin. FNS uses this data to determine how effectively FNS programs are reaching potential eligible persons and beneficiaries, identify areas where additional outreach is needed, assist in the selection of location for compliance reviews, and complete reports as required.

Per 7 CFR 272.6(g), State agencies that administer SNAP are required to collect data on participants' race and ethnicity in the manner specified by FNS. The regulations provide that the application form must clearly indicate that the information is voluntary and that it will not affect the eligibility or the level of benefits. SNAP regulations at 7 CFR 272.6(g) also require State agencies to develop alternative means of collecting racial and ethnic data on households, such as by observation during the interview, when the information is not provided voluntarily by the household on the application form.

State agencies report aggregate race and ethnicity data to FNS annually via the form FNS-101, "Participation in Food Programs by Race" (Office of Management and Budget (OMB) Control Number 0584-0594, expiration 7/31/2023). FNS uses this aggregate data to conduct compliance reviews and investigations, identify trends or disparities that affect participation goals and opportunities to address them, and identify any potential adverse or disproportionate impacts when developing program policy.

Review of Visual Observation Policy and Proposed Regulatory Change

OMB Directive 15, Standards for the Classification of Federal Data on Race and Ethnicity,² provides that self-identification is the preferred means for gaining information about an individual's race and ethnicity, when practicable, and notes that when these data points are collected through observation, they are likely to be very different than from the information obtained when respondents report about themselves, especially in populations with multiple racial heritages.

In a recent review of existing policy by the FNS Civil Rights Division and Child Nutrition Programs,³ FNS updated its policy to eliminate visual observation as data collection method for other FNS programs where “visual observation” was permitted per the regulatory language or policy guidance. The review referenced reports stating that program participants do not want to have their race or ethnicity determined for them. Moreover, FNS concluded in this policy update that a third party's observation of an individual's appearance is not a reliable means to capture how a participant self-identifies their own racial or ethnic identity. This conclusion is supported by a recent Center for Medicaid Studies (CMS) study that assessed the quality of race and ethnicity information in observational health databases. The study suggested that patient self-reporting may provide better quality data than visual observation.⁴

A review of SNAP policy led to the conclusion that the use of visual observation for racial and ethnicity identification is unreliable data as it requires that State eligibility workers assume or guess the race or ethnicity of households. Therefore, FNS has determined that SNAP State agencies are no longer permitted to collect racial and ethnic data on households through visual observation. State agencies must continue to use

² 62 FR 58782 (October 30, 1997) (<https://www.govinfo.gov/content/pkg/FR-1997-10-30/pdf/97-28653.pdf>).

³ CACFP 11-2021, SFSP 07-2021- “Collection of Race and Ethnicity Data by Visual Observation and Identification in the Child and Adult Care Food Program and Summer Food Service Program – Policy Rescission” (<https://www.fns.usda.gov/cn/Race-and-Ethnicity-Data-Policy-Rescission>)

⁴ <https://www.cms.gov/about-cms/agency-information/omh/downloads/data-collection-resources.pdf>

alternative means to collect this information when not provided voluntarily on the SNAP application.

Accordingly, through this rule FNS proposes revising paragraph (g) at 7 CFR 272.6 to remove the phrase, “such as by observation during the interview,” as a way for SNAP State agencies to collect racial and ethnic data from households that do not voluntarily provide it in their application. FNS believes this change will better align SNAP regulations with current Federal policy (including Title VI of the Civil Rights Act of 1964) by improving the quality of collected data. This proposed rule will increase the accuracy of data collected on the race and ethnicity of SNAP households by reducing errors in data collection caused by inaccurate visual observation. Eliminating the use of visual observation would still provide FNS the information needed to meet the Federal requirement to collect this data. This underreporting may be mitigated through the use of other data sources or statistical tools to account for the times when participants choose not to self-identify.

FNS acknowledges the potential challenges this regulatory change may place on States’ administrative processes for collecting demographic data. States should continue to explain the importance of this data to participants as they encourage them to self-identify and self-report.

States must still develop an alternative means of collecting the data, besides visual observation, when participants do not voluntarily provide the information. In developing these alternative collection methods, FNS encourages States to consider obtaining the data from other reliable sources where the respondent has self-identified race or ethnicity, such as applications for other assistance programs operated by the State agency (e.g., employment, health, or social services). During the public comment period on this rule, FNS encourages States to submit comments on best practices for developing alternative

methods for collecting race and ethnicity data when the information is not voluntarily provided on the application form. FNS plans to provide guidance to States on this issue.

Procedural Matters

Executive Order 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility.

This proposed rule has been determined to be not significant after it was reviewed by OMB in conformance with Executive Order 12866.

Regulatory Impact Analysis

This rule has been designated as not significant by the Office of Management and Budget. Therefore, no Regulatory Impact Analysis is required.

Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601-612) requires Agencies to analyze the impact of rulemaking on small entities and consider alternatives that would minimize any significant impacts on a substantial number of small entities. Pursuant to that review, the Secretary certifies that this rule would not have a significant impact on a substantial number of small entities. This proposed rule would not have an impact on small entities because the changes required by the regulations are directed toward State agencies operating SNAP.

Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 et seq.), the Office of Information and Regulatory Affairs designated this rule as not a major rule, as defined by 5 U.S.C. 804(2).

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104-4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local and Tribal governments and the private sector. Under section 202 of the UMRA, the Department generally must prepare a written statement, including a cost benefit analysis, for proposed and final rules with “Federal mandates” that may result in expenditures by State, local or Tribal governments, in the aggregate, or the private sector, of \$100 million or more in any one year. When such a statement is needed for a rule, Section 205 of the UMRA generally requires the Department to identify and consider a reasonable number of regulatory alternatives and adopt the most cost effective or least burdensome alternative that achieves the objectives of the rule.

This proposed rule does not contain Federal mandates (under the regulatory provisions of Title II of the UMRA) for State, local and Tribal governments or the private sector of \$100 million or more in any one year. Thus, the rule is not subject to the requirements of sections 202 and 205 of the UMRA.

Executive Order 12372

SNAP is listed in the Catalog of Federal Domestic Assistance under No. 10.551. For the reasons set forth in the Federal Register notice, published June 24, 1983 (48 FR 29115), this Program is excluded from the scope of Executive Order 12372, which requires intergovernmental consultation with State and local officials.

Federalism Summary Impact Statement

Executive Order 13132 requires Federal agencies to consider the impact of their regulatory actions on State and local governments. Where such actions have federalism

implications, agencies are directed to provide a statement for inclusion in the preamble to the regulations describing the agency's considerations in terms of the three categories called for under Section (6)(b)(2)(B) of Executive Order 13132.

The Department has determined that this rule does not have federalism implications. This rule does not impose substantial or direct compliance costs on State and local governments. Therefore, under Section 6(b) of the Executive order, a federalism summary impact statement is not required.

Executive Order 12988, Civil Justice Reform

This proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is intended to have preemptive effect with respect to any State or local laws, regulations or policies which conflict with its provisions or which would otherwise impede its full and timely implementation. This rule is not intended to have retroactive effect unless so specified in the Effective Dates section of the final rule. Prior to any judicial challenge to the provisions of the final rule, all applicable administrative procedures must be exhausted.

Civil Rights Impact Analysis

FNS has reviewed the proposed rule, in accordance with Department Regulation 4300-004, Civil Rights Impact Analysis, to identify and address any major civil rights impacts the rule might have on minorities, women, and persons with disabilities. The changes to SNAP regulations in this proposed rule are to remove third party visual observation for race and ethnicity data collection from SNAP regulations. After careful review of the rule's intent and provisions, FNS believes that the promulgation of this rule will increase the accuracy of data collected on the race and ethnicity of SNAP households by reducing errors in data collection caused by inaccurate visual observation. While this rule does provide for the collection of racial and ethnic data of SNAP households, as required by Federal law, it does not change any eligibility criteria.

Executive Order 13175

Executive Order 13175 requires Federal agencies to consult and coordinate with Tribes on a government-to-government basis on policies that have Tribal implications, including regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes. We are unaware of any current Tribal laws that could be in conflict with this rule.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. Chap. 35; 5 CFR part 1320) requires OMB approve all collections of information by a Federal agency before they can be implemented. Respondents are not required to respond to any collection of information unless it displays a current valid OMB control number under the Paperwork Reduction Act of 1995.

Information collection activities associated with this rule are approved under existing OMB Control Numbers. OMB Control Number 0584-0064 (expiration 02/29/2024) includes burden estimates associated with the collection of race and ethnicity data on SNAP applications. OMB Control Number 0584-0594 (expiration 07/31/2023) includes burden estimates associated with race and ethnicity data reporting on the form FNS-101, "Participation in Food Programs - by Race". The proposed changes in this rule do not introduce any new or changed information collection requirements subject to approval by the Office of Management and Budget under the Paperwork Reduction Act of 1995.

E-Government Act Compliance

The Department is committed to complying with the E-Government Act of 2002, to promote the use of the Internet and other information technologies to provide increased

opportunities for citizen access to Government information and services, and for other purposes.

List of Subjects in 7 CFR Part 272

Civil rights, Claims, Grant programs—social programs, Reporting and recordkeeping requirements, Unemployment compensation, Wages.

Accordingly, 7 CFR part 272 is amended as follows:

PART 272 -- REQUIREMENTS FOR PARTICIPATING STATE AGENCIES

1. The authority citation for part 272 continues to read as follows.

Authority: 7 U.S.C. 2011-2036.

2. In § 272.6, revise the third sentence in paragraph (g) to read as follows:

§ 272.6 Nondiscrimination compliance.

* * * * *

(g) * * * The State agency must develop alternative means of collecting the ethnic and racial data on households when the information is not provided voluntarily by the household on the application form.

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Cynthia Long,
Administrator,
Food and Nutrition Service.